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2 **FINDINGS OF FACT**

3 **I**

4 Harry Edward Donovan filed an appeal April 30, 1992, contesting denial of a
5 shorelines substantial development, conditional use and variance permit by the City of
6 Tacoma. The permits were to allow completion of a 3-story addition to an existing overwater,
7 single-family dwelling and to allow the building to exceed the 35 foot height limit.

8 **II**

9 The new overwater dwelling is located adjacent to the existing one-story dwelling
10 identified as Cabin #76 Salmon Beach. The community of Salmon Beach fronts on the
11 Tacoma Narrows between the Narrows Bridge and Point Defiance in an area designated as an
12 Historic District by the State of Washington. Salmon Beach consists of single family
13 residences constructed over the water on posts or piling. Because of its location and rustic
14 nature of the houses, the community has considerable historical significance. A steep bluff
15 rises almost directly from the beach, and limits landward building space. Many have been
16 enlarged or renovated over the years, often without permits. Until recently there was no
17 sewage system, and sewage went directly into the water.

18 **III**

19 Mr. Donovan's new structure was built on approximately 20 new wooden pilings.
20 Both the old and new structures are located in the "S-3" District under the Tacoma Shoreline
21 Master Program ("TSMP"). The appellant began work on the structure in 1982. The new
22 structure is 3 stories high, measuring approximately 40 feet from the ordinary high water
23 mark. It has approximately 3,000 square feet and is very sturdily built.

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2 IV

3 On March 2, 1982, during an inspection of Salmon Beach, a Tacoma Public Works
4 Department building inspector observed a partially constructed dwelling adjacent to Cabin
5 No. 76, Salmon Beach. Records indicated no permit had been issued for the building. The
6 inspector posted a red tag "Stop Work Order" on the structure.

7 V

8 On December 14, 1982, when a second inspection was made of the structure, the
9 building inspector noted that the original "stop work order" had been removed, so a second
10 "stop work order" was posted. The Public Works Department advised the Planning
11 Department of the construction actively progressing at the site.

12 VI

13 An inspection February 4, 1983 by Planning Department Personnel disclosed work was
14 continuing on the structure, as did a March 11, 1983 inspection. A Regulatory Order was
15 issued April 6, 1983 to Harry Donovan, instructing him to cease construction and to apply for
16 necessary permits.

17 VII

18 Construction activity continued, a May 24, 1983 inspection revealed. Subsequent
19 inspections of the site conducted by the Planning Department in August, September and
20 October, 1983, indicated work was still continuing inside the structure.

21 VIII

22 On October 29, 1983, Harry Donovan applied for a shoreline Substantial
23 Development/Conditional Use permit and variance to allow the dwelling to exceed the 35 foot
24 height limit for buildings constructed in the "S-3" Western Slope (North) shoreline District of
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1 Tacoma. Mr. Donovan had built the structure to a height of 40 feet above the OHWM, and
2 34 feet, 5 inches from the top of his pier to the highest point on the roof.
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4 IX

5 On November 22, 1983, the City of Tacoma and the State of Washington Department
6 of Ecology filed a complaint for Preliminary Injunction in the Superior Court of Pierce County
7 against Mr. Donovan and the Salmon Beach Improvement Club, Inc. to halt any further
8 construction activity by Donovan until the necessary shoreline and building permits were
9 legally issued.

10 X

11 The Superior Court issued a preliminary injunction on December 9, 1983, and
12 construction activity on the subject structure ceased at Cabin #76 Salmon Beach.

13 XI

14 The State Shoreline Management Act provides for civil penalties in amounts up to
15 \$1,000 for each day of continued development without a required permit. (RCW 90.58.210).
16 It also provides that any person who violates the SMA, "shall be liable for all damage to
17 public and private property arising from such violation, including the cost of restoring the
18 affected area to its condition prior to the violation." (RCW 90.58.230).

19 XII

20 A public hearing was held on March, 1984, on Mr. Donovan's application for the
21 shoreline permit, but because of the incompleteness of the application, the Tacoma hearing
22 examiner continued the matter to an undetermined date to allow Mr. Donovan additional time
23 to file a complete application pursuant to WAC 173-14-110, and the Tacoma Shoreline Master
24 Program.

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2 XIII

3 Six years passed, and the City of Tacoma issued a second regulatory order on May 10,
4 1990, instructing Mr. Donovan to complete the Shoreline permit process or face monetary
5 penalties.

6 On May 22, 1990, Mr. Donovan revised his shoreline application and a public hearing
7 was held February 5, 1991.

8 XIV

9 On July 18, 1991, the Tacoma Hearing Examiner recommended denial of the shoreline
10 permit and the variance. On August 21, 1991, Mr. Donovan's request for reconsideration was
11 denied. An appeal to the Tacoma City Council on November 26, 1991, resulted in a remand
12 to the Hearing Examiner to look specifically at the issue of Mr. Donovan's pre-existing use
13 rights.

14 XV

15 The cabin #76 area is designated as a "Conservancy environment" which is designed to
16 protect, conserve and manage existing shoreline, natural resources, and valuable historic and
17 cultural shoreline areas. (TSMP 13.10.030 4.2. There is also the specific intent "to generally
18 conserve the entire S-3 area in its natural state, which will allow the continuation of the
19 residential community of Salmon Beach as a historic area of the city." TSMP 13.10.060.

20 XVI

21 Existing use activities not specifically identified as permitted or conditional uses are
22 considered "pre-existing uses." TSMP 13.10.190. Pre-existing uses "shall be subject to the
23 same development and improvement regulations controlling the permitted uses of the shoreline
24 district in which they are located," with the following exceptions:

C. A pre-existing use (including a pre-existing permitted or conditional use, the expansion of which is limited by this chapter, shall be permitted to expand from the site it lawfully occupied at the time of the adoption of this chapter only onto contiguous undeveloped property owned or under lease to the uses at the time of the adoption of this chapter.

XVII

Construction of a 3-story, 3,000 square foot structure adjacent to a one-story structure of approximately 720 square feet cannot be considered an expansion, when the owner intends to remove the old structure once the new one is complete. As such, the new construction cannot be called an "expansion" or addition of the old dwelling.

XVIII

The City of Tacoma has granted several shoreline substantial development/conditional use permits or variances for residents of Salmon Beach since the TSMP was amended in 1980. None involved construction of substantial new over water structures.

XIX

The Tacoma Hearing Examiner on January 6, 1992, again recommended denial of Mr. Donovan's shoreline substantial development/conditional use and variance permit after reviewing the applicant's pre-existing use rights. The Tacoma City Council concurred in the denial on March 17, 1992. Mr. Donovan sought review of that denial April 23, 1992, which became appeal SHB NO. 92-17 now before the Board.

XX

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER
SHB NO. 92-17

1
2 **CONCLUSIONS OF LAW**

3 **I**

4 We review the appellant's development and Tacoma's denial of the permits for their
5 consistency with the City of Tacoma's Shoreline Master Program (TSMP) and the Shoreline
6 Management Act of the State of Washington. The appellant has the burden of proving that the
7 development is consistent with the TSMP and SMA. RCW 90.58.140(2) and (7).

8 **II**

9 We review whether the proposal constitutes an expansion of the original structure, or a
10 completely new structure.

11 We conclude that the 3,000 square feet, 3-story building set on new pilings is not an
12 expansion or addition but is a new structure, in that the old cabin #76 was to be removed once
13 the new large structure was to be completed. TSMP 13.10.190

14 Others in Salmon Beach have reconstructed their dwellings on top of existing pilings
15 and building platforms. Mr. Donovan could have pursued such a course, but he did not come
16 forward and apply for shoreline permits before beginning construction so he could have been
17 assisted in developing the property.

18 **III**

19 We conclude that the appellant was unable to prove that new overwater residential
20 development is allowed without a variance or conditional use permit. TSMP 13.10.060 D &
21 E. RCW 90.58.140(12).

22 **IV**

23 We also review whether the appellant's development meets requirements for granting a
24 Conditional Use Permit under WAC 173-14-140.

1 We conclude that appellant's project cannot demonstrate all the criteria listed, most
2 particularly RCW 90.58.020.
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4 V

5 We conclude the project requires a height variance being higher than 35 feet as defined
6 by TSMP 13.10.030(B)(K). The TSMP 13.10.070F states that any building structure or
7 portion thereof erected in the "S-3" District "shall not exceed a height of 35 feet."

8 Height is measured from "average grade," which in the case of overwater structures is
9 the "ordinary high water line." Mr. Donovan's new structure measures 34 feet 5 inches from
10 the top of his pier to the highest point on the roof, but the top of the pier is located
11 approximately five feet above the ordinary high water line. Therefore, the structure requires
12 at least a four foot seven inch variance from code requirements.

13 VI

14 In order for a variance to be granted, Mr. Donovan would have to
15 demonstrate all of the following:

16 *a. that strict application of the height requirement would*
17 *preclude a reasonable use of the property not otherwise*
prohibited by this chapter;

18 *b. that the hardship requiring the variance is specifically related*
19 *to the property, and is the result of unique conditions, such as*
20 *irregular lot shape, size, or natural features;*

21 *c. that the design of the project is compatible with other*
22 *permitted activities in the area and will not cause adverse impacts*
to adjacent properties or the shoreline environment;

23 *d. that the requested variance does not constitute a grant of*
24 *special privilege not enjoyed by other properties in the area, and*
25 *is the minimum necessary to afford relief;*

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2 *e. that the public interest will suffer no substantial detrimental*
3 *effect; and*

4 *f. that the public rights of navigation and use of the shoreline*
5 *will not be adversely affected.*

6 The appellant does not meet several of these criteria. Strict application of the height
7 restriction would not preclude a reasonable permitted use of this property. Others residents of
8 Salmon Beach have reconstructed their homes to a height of less than 35 feet. Any hardship
9 that results from strict adherence to height limit is entirely due to the appellant's own actions,
10 and not the result of "unique condition", specific to the property. We cannot justify a height
11 variance under TSMP 13.10.180(13)(a) and under WAC 173-14-155(3)(c).

12 To grant a variance here would constitute a grant of "special privilege" not enjoyed by
13 other properties in the area.

14 The cumulative impact of granting additional requests of like actions in the area must
15 be considered as detrimental to the public interest. See WAC 173-14-150(4). Mr. Donovan's
16 request is the first of such for the area. It is the tallest structure in the area. The effect of
17 granting almost a five foot height variance to the appellant could ultimately result in allowing
18 the entire Salmon Beach community to increase its bulk and scale by five feet.

19 VIII

20 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
21 From the foregoing, the Board issues this:


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ORDER

The City of Tacoma's denial of a shoreline substantial development/conditional use permit and variance to appellant Harry E. Donovan for his new structure at Cabin No. 76 Salmon Beach is affirmed, including the directive that the structure be removed.

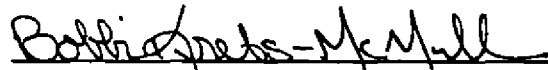
DONE this 29th day of July, 1993.

SHORELINES HEARINGS BOARD

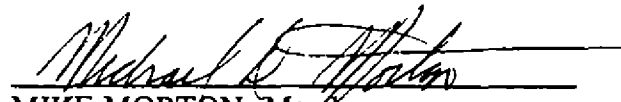

HAROLD S. ZIMMERMAN, Chairman


ROBERT V. JENSEN, Attorney Member


RICHARD C. KELLEY, Member


BOBBI KREBS-McMULLEN, Member


O'DEAN WILLIAMSON, Member


MIKE MORTON, Member

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